

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

77 1283

To be argued by
DAVID J. GOTTLIEB

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----x
UNITED STATES OF AMERICA,
Plaintiff-Appellee,
-against-
ALBERT DUKE, DONALD NIANG,
and ALBERT WILLIAMS,
Defendants-Appellants.
-----x

B
AGS
Docket No. 77-1283
Docket No. 77-1289

BRIEF FOR APPELLANT
ALBERT WILLIAMS

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

MARTIN ERDMANN, ESQ.,
THE LEGAL AID SOCIETY,
Attorney for Appellant
ALBERT WILLIAMS
FEDERAL DEFENDER SERVICES UNIT
509 United States Courthouse
Foley Square
New York, New York 10007
(212) 732-2971

DAVID J. GOTTLIEB,
Of Counsel.

CONTENTS

	<u>Page</u>
Table of Cases	ii
Question Presented	1
Statement Pursuant to Rule 28(a)(3)	
Preliminary Statement	2
Statement of Facts	2
A. The Government's Case	4
B. The Defense Case	9
C. Evidence Regarding Fred Pettaway	10
D. The Court's Charge to the Jury	13
ARGUMENT	
IT WAS ERROR TO PROHIBIT DEFENSE QUESTIONING AS TO THE WHEREABOUTS OF FRED PETTAWAY	14
Conclusion	18

TABLE OF CASES

<u>Chambers v. Mississippi</u> , 410 U.S. 284 (1973)	17
<u>Graves v. United States</u> , 150 U.S. 118 (1893)	15
<u>Stewart v. United States</u> , 418 F.2d 1110 (D.C. Cir. 1969) .	15
<u>United States v. Ayala</u> , 307 F.2d 574 (2d Cir. 1962)	17
<u>United States v. Erb</u> , 543 F.2d 438 (2d Cir.), cert <u>cert. denied</u> , 97 S.Ct. 493 (1976)	15, 16

<u>United States v. Malizia</u> , 503 F.2d 578 (2d Cir. 1974), <u>cert. denied</u> , 420 U.S. 912 (1975)	17
<u>United States v. Schwartz</u> , 535 F.2d 160 (2d Cir. 1976), <u>cert. denied</u> , 97 S.Ct. 1175 (1977)	17
<u>United States v. Super</u> , 492 F.2d 319 (2d Cir.), <u>cert.</u> <u>denied</u> , 419 U.S. 876 (1974)	15

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-against-

ALBERT DUKE, DONALD NIANG,
and ALBERT WILLIAMS,

Defendants-Appellants.

Docket No. 77-1283

Docket No. 77-1289

BRIEF FOR APPELLANT
ALBERT WILLIAMS

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

QUESTION PRESENTED

Whether it was error for the district court to prohibit
defense counsel from questioning as to the whereabouts of
Fred Pettaway, an unindicted co-conspirator.

STATEMENT PURSUANT TO RULE 28(a)(3)

Preliminary Statement

This is an appeal from a judgment of the United States District Court for the Southern District of New York (The Honorable Lee P. Gagliardi) entered June 2, 1977, after a jury trial, convicting appellant Albert Williams of four counts of unlawfully transporting, receiving or selling stolen securities in interstate commerce (18 U.S.C. §§2314, 3237, 2315, and 2) and conspiracy to do so (18 U.S.C. §371). Appellant Williams was sentenced to concurrent terms of 18 months' imprisonment on four of the counts, and to six months' imprisonment on one count. Execution of sentence on the latter count was suspended and appellant was placed on probation for a period of four years, to commence upon completion of his sentence of incarceration.

The Legal Aid Society, Federal Defender Services Unit, assigned by the court below to represent Mr. Williams at sentencing, was continued by this Court as counsel on appeal, pursuant to the Criminal Justice Act.

Statement of Facts

By an indictment* filed September 24, 1976, appellant Albert Williams (named as John Doe, or "Sonny") and eight

*The indictment is B to the separate appendix to the briefs of appellants Duke and Williams.

co-defendants were charged with conspiring to steal, transport in interstate commerce, receive, and sell stolen securities. The Government's theory was that co-defendant Ronald Crosby stole the securities from the mail room of the Toledo Trust Company, Toledo, Ohio, delivering them in Toledo to co-defendants Ted Adams and his sister. Adams and co-defendants August Barbine and Pruitt Williams were alleged to have transported the stock to New York for delivery to Freddie Pettaway, appellant Williams, and co-defendant "Donald" (Niang), who in turn allegedly arranged for delivery in New York of the stock certificates to Albert Duke, who was to resell the securities. Prior to trial, the co-defendants on the Ohio end of the conspiracy agreed to plead guilty to the indictment. On November 16, 1976, Crosby pleaded guilty to one count of the indictment; on November 22, 1976, August Barbine pleaded guilty to one count of the indictment; and on the same day, Ted Adams, his sister, Ermajean Adams, and Pruitt Williams had their cases transferred to the Northern District of Ohio for pleading, pursuant to Rule 20, Fed.R.Cr.P.

On November 24, 1976, a superseding indictment* was filed, charging appellant Williams and co-defendants Niang and Duke with two counts of receiving and selling stolen securities traveling in interstate commerce, two counts (co-defendant Duke was charged in only one) of transporting securities in

*The superseding indictment is also part of B to the separate appendix to the briefs of appellants Duke and Williams.

interstate commerce, and conspiracy to commit the above offenses. The remaining co-defendant, Fred Pettaway, was not charged in the superseding indictment, but was merely named as an unindicted co-conspirator. On December 2, 1976, appellant Williams and co-defendants Duke and Niang appeared for trial before Judge Gagliardi and a jury.

A. The Government's Case

The Government's principal witnesses were four of the Ohio defendants. Crosby, formerly employed as a mail clerk by the Toledo Trust Company, testified to the circumstances of the theft (45-46*). Crosby had recently pleaded guilty before Judge Gagliardi to one count of conspiracy, with a promise by the Government not to prosecute the other counts and an agreement to call his cooperation to the sentencing judge (43-44). Crosby became interested in stealing securities as a result of his acquaintance with co-defendant August Barbine, the brother of his fiancée. At a meeting with Barbine in Atlanta, Barbine inquired whether Crosby could obtain stock. Crosby said he could get a million dollars' worth (46-48, 52). Ten days later, Crosby met with Barbine again and was introduced to Ted Adams. The following day -- approximately May 4 or 5, 1976 -- he took some stock in a manila envelope from the mail room, giving the envelope to Adams (53-57).

*Numerals in parentheses refer to pages of the transcript of the trial.

A week later the pattern was repeated, with Crosby delivering to Adams some yellow and white colored stock certificates (60). Crosby's third and final theft occurred yet a week later. This time the stock certificates were delivered to Ermajean Adams, Ted Adams' sister (61-62). Following his final theft, Crosby never saw Barbine again, and he never received any proceeds from the theft (63-64).

Ted Adams* testified that he met August Barbine through their mutual friend, Pruitt Williams (86). At Pruitt Williams' request, Barbine stayed at Adams' home. A week into Barbine's stay, Barbine told Williams he had a friend who could help obtain a million dollars' worth of bonds (87-88). In discussion of where the bonds could be disposed of, Adams told Barbine he had a close friend, Fred Pettaway, in New York, and that Pettaway could help them (89). Adams and Barbine therefore decided to attempt to dispose of the stocks through Pettaway in New York. After receiving the first batch of stock from Crosby,** Adams telephoned Pettaway and told Pettaway that he (Adams) was broke, but that he would

*Adams was a former heroin user who pleaded guilty in Toledo to two counts of the indictment with an agreement that the Assistant U.S. Attorney would call his cooperation to the attention of the sentencing judge (82-85).

**Adams stated that he picked up the first delivery with Williams and that the stock certificates were for Reliance Electric Company and Houston Oil (94). Barbine stated that the stocks were blue and white and were for Houston Natural Gas Corporation. Noting that the stocks were not bearer bonds, Barbine alleged that he explained this to Crosby, who said he would "take care of it" (163).

like to get to New York "because I thought I had something of value, some merchandise," and that he wanted to bring Barbine with him (95). Pettaway allegedly replied that he didn't want to know anything about Adams' merchandise, but agreed to see what he could and said he would help Adams after they arrived in New York (96).

A week later, after the second stock delivery by Crosby, Adams received a call from Pettaway, who said that two tickets to New York were waiting for Adams at the airline terminal. During the conversation, Adams spoke to one "Donald," who allegedly said he was going to help Adams get to New York and inquired about the nature of the merchandise. On May 12, Adams and Barbine flew to Newark Airport on an airline ticket apparently purchased by an Albert Williams (98-103, 355-358).

The stocks were actually transported to New York by the person who originated the conspiracy, August Barbine (211). At the time these crimes occurred, Barbine was a fugitive, with outstanding charges in Ohio and Colorado, was a heroin addict, and had a prior conviction for arson (157-158, 282-823).

*Adams testified that the stocks were the same color as those involved in the first delivery, in amounts of approximately \$150,000, \$135,000, or more (98). Barbine stated that they were "orange-green" certificates from Potomac Electric Power Company (165).

In return for his testimony in this case, Barbine was permitted to plead guilty to a single count of interstate transportation of stolen securities, with a Government promise to call his cooperation to the attention of the sentencing judge and to the attention of local authorities and courts in Ohio and Colorado (156, 280-283).

Barbine stated that upon his arrival at Newark Airport, he was met by Pettaway and appellant Williams, and was driven to Niang's house (165-166). According to Barbine, when they reached the house, appellant Williams asked to see the securities, was shown them, and expressed the hope that he could get rid of them. Later that night, they traveled to Fred Pettaway's boxing gym (167-169). At the gym office, appellant Williams allegedly asked Adams how much he wanted for the securities, and Adams said half (170). Adams, however, failed to mention this conversation in his testimony, and described his conversations with appellant Williams and co-defendant Niang as limited to inquiries concerning Adams' back condition (109-110). A week later, Adams left New York to return to Ohio, with Barbine remaining in New York (170).

The final delivery of securities was brought to New York by Pruitt Williams (173), who brought them to Niang's apartment. There, appellant Williams allegedly repeated that he would try to get rid of them. Barbine gave the stock, which he believed to be Reliance Electric, to Niang (174-175). Later, appellant Williams related that he was going to give the stock

to one "Duke" to have the names altered and sold (176-177). Barbine testified that he saw appellant Williams in conversation with co-defendant Albert Duke some five or six different times (178). Pruitt Williams returned to Toledo some two weeks after his arrival; Barbine remained in New York a total of six weeks (289). Barbine noted that his cut was to be one-third, with Niang and appellant Williams splitting one-third, and Adams and Pruitt Williams splitting the other third (180).

Barbine, like Adams, asserted that Pettaway, the one original defendant who neither pleaded guilty nor stood trial, did not want any share of the proceeds of the stock (192), and he denied discussing with Pettaway the attempt to distribute bonds and securities (289). Yet Barbine was forced to admit, on cross-examination, to having given a different story to the FBI, in which he asserted that Pettaway had introduced Barbine to a man named "Frank," whom he met in Manhattan (317), and that it was Frank, a master of disguises, who was trying to dispose of the securities (316).*

*The remaining witnesses for the Government included the following: Robert Black and Alan Harris, employees of the Toledo Trust Company, who testified that bond coupons payable by the Monroe County Pollution Control Board, and stock certificates of the Potomac Electric Power Company, Reliance Electric Engineering Company, and Houston Natural Gas Company, with a monetary value of more than half a million dollars, were either not mailed or not received by the institutions which were to receive them (319, 323, 326, 331, 348, 350); John Curran and Craig Dolto, who witnessed meetings between co-defendant Albert Duke and Special Agent John Hauss (365-366, 381); Agent Hauss, to whom Duke allegedly stated that he could deliver some freshly-taken stock, and to whom Duke delivered a group of securities (393, 395); and Agent Damon C. Taylor, to whom Agent Hauss gave a packet of securities (417).

B. The Defense Case

Donald Niang, the brother of appellant Williams, denied transporting or possessing any stolen securities.* Niang, like appellant Williams a former boxer and boxing fan, knew Fred Pettaway by having donated a boxing ring to his gym (501). During the spring of 1976, Pettaway called Niang and said he had some people in Toledo interested in setting up a boxing tournament between fighters in Cleveland, Toledo, and Philadelphia. Niang believed he had been called by Pettaway because of Niang's contacts with the Philadelphia boxing community (502). Told by Pettaway that the Toledo parties had no funds to come to New York, Niang, Williams and Pettaway paid the transportation costs to bring them here. Niang first saw Adams and Barbine in his apartment. He was told that the pair had been to Pettaway's house, but that there was no room there. Pettaway offered \$50 per week to Niang if he would put up Barbine and Adams, and Niang agreed to do so (503). While Barbine was staying at Niang's house, he made a number of telephone calls and kept claiming he was setting up the boxing tournament. Eventually, Niang became suspicious of Barbine, noticing him arriving at night appearing to be under the influence of drugs. After Niang's wife noticed that

*Niang, who served with and was honorably discharged from the Air Force and the Army (496), admitted previous convictions for forgery and a violation of the narcotics laws (499).

a ring of hers was missing and threatened to call the police, Barbine left the apartment (505). Niang denied ever seeing or discussing securities with Barbine (505).

Appearing on behalf of appellant Williams, Samuel Price, executive director of one of the community poverty programs in central Harlem, testified that appellant Williams worked at that program from Spring 1974 to the time of the trial at a salary of \$5,000 per year. He noted that Williams was an amateur boxer, that Williams was concerned with sports programs such as boxing, and that he had attempted to develop a boxing program for youths in Harlem (486-491).

John Lewis, John Lewis Jr., and Abdul Taha testified for Albert Duke to the effect that Duke was at the Metropolitan Hospital during one of his alleged meetings with federal agents (444, 454, 467).

C. Evidence Regarding Fred Pettaway

Although indicted as one of the original defendants in the case, Fred Pettaway was not named as a co-defendant in the superseding indictment, but was reduced to the role of an unindicted co-conspirator. Shortly after his indictment, Pettaway gave a statement to the Assistant U.S. Attorney, exculpatory in some respects as to appellant Williams (see 437-438). During Barbine's testimony, outside the jury's presence, counsel for appellant Williams informed the court that he had endeavored to sub-

poena Pettaway but was unable to find him. -- The Government's reply was that because the original indictment against Pettaway was still outstanding, the Government had no control over him and would not attempt to produce him (241-242).

During cross-examination of Agent Taylor, counsel for appellant Williams elicited that the FBI had taken Pettaway to its offices following his indictment. Counsel then asked, inter alia, the following questions:

He is not, at this moment, to your knowledge available to the -- ?

Do you know where he is, Mr. Taylor?

You are aware that Fred Pettaway is presently at large, are you not?

Objection to all the above questions was sustained (426-427).

The following day, following presentation of the defense case, the court informed the defense:

I don't know what you are going to say with respect to Mr. Pettaway, but there is absolutely no testimony in this record with respect to the availability or unavailability or interest of Mr. Pettaway in this case and any comments with respect thereto will be handled by me.

(536).

Counsel for co-defendant Duke pointed out that although the witness was available for both sides, in reality "he is not available and is running for his life" (536). The court repeated that there was no testimony in the record with respect to Pettaway's availability (536). Counsel for Niang pointed out such questions concerning Pettaway's whereabouts

had been asked, but that objections to them had been sustained by the court (538).

Judge Gagliardi, who does not permit counsel to approach the bench while the jury is present, but requires that counsel wait for recesses to do so,* defended his ruling on the ground that the defense had failed to make an offer of proof, stating that if such an offer had been made the court would have permitted the defense to ask the questions (538). The colloquy concluded with the court's ruling that there was nothing in the record, but that counsel could tell the jury that the question of Pettaway's whereabouts had been asked by the defense but that the court had sustained objection (539).

In the Assistant U.S. Attorney's summation, at the very outset it was noted that Pettaway's guilt was not at issue in the case and that "there is no evidence in the record as to what has happened or will happen to Freddie Pettaway" (547).

In summation for Niang, counsel argued that Pettaway's participation was far more extensive than contended by the Government, and that the extent of his role was minimized because he was Adams' good friend (585). Counsel noted that the court sustained the question asked by the defense as to Pettaway's whereabouts (589). Similarly, in summation for appellant Williams, although counsel asserted that Pettaway was a "missing link," he noted the lack of evidence as to Pettaway's whereabouts (597-598).

*See transcript of December 2, 1976 (10:20 a.m.) at 8a-9a.

D. The Court's Charge to the Jury*

In his instructions to the jury, Judge Gagliardi charged:

Now, if a potential witness could have been called by the Government or by the defendants and neither side called him then you may infer that the testimony of the absent witness might have been unfavorable either to the Government or to the defendant or to both of them. On the other hand, it is equally within your province to draw no inference from the failure of either side to call a witness.

(693-694).

Following deliberations, the jury found appellant Williams guilty on all counts.

On February 23, 1977, the Assistant U.S. Attorney recommended that an order of nolle prosequere be filed as to the co-defendant Pettaway, and on June 3, 1977, the order was approved and filed in the district court.

(Footnote continued from the preceding page)

*The complete text of Judge Gagliardi's charge to the jury is reproduced as C to the separate appendix to the briefs for appellants Duke and Williams.

ARGUMENT

IT WAS ERROR TO PROHIBIT DEFENSE
QUESTIONING AS TO THE WHEREABOUTS
OF FRED PETTAWAY.

Fred Pettaway was a central, although absent, figure at this trial. According to the Government, it was Pettaway, named an unindicted co-conspirator, who made the introduction of Adams and Barbine to appellant Williams. According to the defense, it was Pettaway who helped dupe Niang and appellant Williams into believing that Barbine and Adams were in New York to set up a boxing tournament. Moreover, since the defendants alleged that they had not disposed of the securities, they attempted to show that it was Pettaway who may have disposed of them.

No matter which version of Pettaway's participation was correct, it is clear that he would have been an important -- perhaps crucial -- witness. Thus, prior to trial, defense counsel attempted to subpoena Pettaway, but was unable to locate him. Then, at trial, in cross-examination, defense counsel attempted to ascertain whether similar efforts had been made by the Government and whether those efforts had been successful. However, counsel was prevented from doing so, as the court sustained objection to questions inquiring as to whether Pettaway was available to the Government, whether the agent knew where Pettaway was, and whether Taylor was aware whether Pettaway was at large (426-427).

The court's decision was erroneous. Moreover, no matter what the answer the agent might have given, the evidence was relevant to the defense.

Thus, if Taylor had stated that he was aware of Pettaway's whereabouts but that the Government had made no effort to produce him, that answer would have established a predicate for argument that an inference be drawn against the Government because of its failure to call Pettaway. It is well established that when a party has it peculiarly within its power to produce a witness who could elucidate the transaction, its failure to produce the witness may give rise to an inference that the witness' testimony would have been unfavorable. Graves v. United States, 150 U.S. 118 (1893); Stewart v. United States, 418 F.2d 1110, 1114 (D.C. Cir. 1969).

Here, there is little doubt that Pettaway would have elucidated the matter at issue; the only issue was his availability. Moreover, in light of the defense's inability to find him, the crucial question was simply whether he was available to the Government. If he was found to be available, counsel could have argued, and the court charged, that an inference could be drawn against the party failing to produce the witness. On the other hand, if Pettaway was found to be unavailable to the Government, no inference could properly be drawn against either side for failure to locate the witness. United States v. Erb, 543 F.2d 438, 444 (2d Cir.), cert. denied, 97 S.Ct. 493 (1976); United States v.

Super, 492 F.2d 319, 323 (2d Cir.); cert. denied, 419 U.S. 876 (1974). Counsel was prohibited from establishing Pettaway's availability by the court's sustaining objection to the questions about whether the Government knew where Pettaway was or whether he was available. Therefore, the defense was put in the position of urging that there was some defect in the Government's case because of its failure to call Pettaway without any evidence that the Government was, in fact, able to call him. The court's ultimate charge on the issue -- that the jury was free to draw an inference against either side if it found a witness to be equally available (United States v. Erb, supra) -- ~~could~~ not have helped the jury here since, as the court also recognized, there was simply no evidence in the record on the issue of availability from which the jury could draw any inference. The court's refusal to allow the defense to develop such evidence was error.

Moreover, it is notable that even if the agent had replied that Pettaway had fled and was at large and unavailable to the Government, the answer would have been relevant to the defense. Appellant Williams' defense here was two-horned: first, he alleged (via his plea and questioning) that he was not guilty; that he, like his brother Niang, had been duped into believing that Barbine and Adams were in New York to arrange a boxing tournament. This defense inevitably had a second aspect -- the allegation that it was Pettaway, not appellant Williams or Niang, who had caused the securities to be transported to

New York, who had arranged their distribution, and who was guilty of the crime.* To the extent Pettaway could be shown to be guilty and not, as Adams claimed, someone without specific knowledge of the alleged activity being carried on by Niang, appellant's claim of innocence was therefore strengthened. See Chambers v. Mississippi, 410 U.S. 284 (1973).

In this regard, evidence that Pettaway had fled, despite being under indictment, was relevant to showing his consciousness of guilt (United States v. Schwartz, 535 F.2d 160, 165 (2d Cir. 1976), cert. denied, 97 S.Ct. 1175 (1977); United States v. Malizia, 503 F.2d 578 (2d Cir. 1974), cert. denied, 420 U.S. 912 (1975); United States v. Ayala, 307 F.2d 574 (2d Cir. 1962)), which itself was relevant, since the issue of Pettaway's involvement in the crimes was an element of the defense for appellant Williams.

Thus, no matter what the answer Taylor might have given to the questions by counsel, the answer would have been relevant, and it was error to have sustained objection.**

*This claim is hardly fanciful in light of Barbine's admission that he had previously informed the FBI that the securities were distributed by Pettaway to a man named Frank.

**Although the court, in a later conference with counsel, asserted that if counsel had brought these answers to the court's attention, the questions might have been permitted, that option was not immediately open to the defense, since it is Judge Gagliardi's policy not to permit bench conferences, but to allow argument only during recesses. It is simply unreasonable to expect counsel, in the heat of cross-examination, to note every question or line of questioning sustained by the court in order that, hours later, he may bring them to the court's attention.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed and a new trial granted.

Respectfully submitted,

WILLIAM J. GALLAGHER, ESQ.,
THE LEGAL AID SOCIETY,
Attorney for Appellant
ALBERT WILLIAMS
FEDERAL DEFENDER SERVICES UNIT
509 United States Courthouse
Foley Square
New York, New York 10007
(212) 732-2971

DAVID J. GOTTLIEB,
Of Counsel.

CERTIFICATE OF SERVICE

October 3, 1977

I certify that a ^{corrected} copy of this brief ~~and appendix~~ has been mailed to the United States Attorney for the Southern District of New York.

David I. Goffman

